

The Disciplinary Process in Kansas and the Rules Relating to the Discipline of Attorneys in Kansas

- Thank you to Stan Hazlett for granting permission to use his materials for this CLE

I. PURPOSE OF THE LAWYER DISCIPLINARY SYSTEM

Disciplinary proceedings are for the protection and the benefit of the public.

- *State v. Scott*, 230 Kan. 564 (1982); *State v. Callahan*, 232 Kan. 136 (1982);
- RULE 202.

II. Rule 208A

- **MANDATORY DISCLOSURE OF PROFESSIONAL LIABILITY INSURANCE—
RULE 208A.**
- Each attorney admitted to the active practice of law shall certify as part of annual registration pursuant to Rule 208 is (1) engaged in the private practice of law; (2) if engaged in the private practice of law, whether the attorney is covered by professional liability insurance; (3) whether the attorney is exempt from the provisions of this rule because the attorney is a full-time government attorney or in-house counsel and does not represent clients outside that capacity.

III. WHERE COMPLAINTS COME FROM – RULE 209

- A. Clients – over 60% - some of which are forwarded by a local bar association grievance committee – RULE 207(a) and 209.
- B. Citizens – around 25% -- attorney-client relationship NOT prerequisite for filing a complaint.
- C. Judges or attorneys – about 15% -- duty to report – primary rule is RULE 207(c) – secondary rule is KRPC 8.3 (Reporting Professional Misconduct).

IV. ORAL COMPLAINTS OR INQUIRIES – RULE 209

- A. Citizen's phone call or in person – listen to person – resolve it then if possible
- Phone call to attorney – no further action – *complaint must be in writing*.
- B. Attorney's phone call with question or information request – discuss and suggest applicable rules – *no written opinion – not binding* – KBA Ethics Advisory
- Committee, Box 1037, Topeka, Kansas 66601, issues non-binding *written* ethics opinions.

**V. WRITTEN COMPLAINT OR REPORT OF
MISCONDUCT
RULE 209, RULE 226 AND ATTORNEY OATH OF
OFFICE RULE 720**

A. Complaints of misconduct under Kansas Rules of Professional Conduct, case law or oath of office – can be made by individual lawyers, NOT firms – conduct can be in or out of attorney client relationship – RULES 202, 226

B. Informal procedure – obtain attorney's version of events by letter without docketing a complaint – 50% of complaints are handled this way – attorney should fully respond – complaint will be dismissed if determined to be frivolous or without merit after response of attorney – RULE 209.

C. Formal procedure - all other complaints will be docketed – assigned a number – respondent's attorney identified and notified – sent to local committee for full investigation - attorney's truthful written response required within 7 days – RULE 207(b).

VI. INVESTIGATION OF COMPLAINT – RULES 205, 207 AND 210

A. All investigations are conducted by or under the supervision of the Disciplinary Administrator – RULE 210 and 205(c)(2). Investigations are conducted by in-house investigators or by outside attorneys.

B. Duty of Cooperation - Disciplinary Administrator can and does in every case call directly upon the responding lawyer for assistance in investigating the case – RULE 207(b) and (c).

C. Disciplinary Administrator may use state or local bar grievance and ethics committees – all investigations under supervision of Disciplinary Administrator – RULE 207(a), RULE 210(b). Over 200 lawyers are on these committees and do almost all of the investigative work.

D. Any individual member of the bar or judiciary can be called upon for assistance – RULE 207(b) and (d) and 210(b).

E. Report of investigation received by Disciplinary Administrator and then sent to review committee with complaint, attorney's response and recommendation of the Disciplinary Administrator – investigation time 2 to 12 months.

F. Additional investigation can be done at any time by the Disciplinary Administrator – RULE 210(e), 211(c). Additional investigation is always done in preparation for hearings

VII. MISCELLANEOUS CONCEPTS

RULES 213, 214, 203(b), 222, 203(a)(4) and (5), 211(f), 217, 204, 223, 206

A. RULE 213 – Refusal of complainant to proceed – settlement – compromise – restitution – DOES NOT abate the complaint.

B. RULE 214 – Related civil or criminal litigation does not necessarily abate the complaint.

C. Temporary suspension by Supreme Court – RULE 203(b) – order to show cause – generally criminal conduct – expedited proceeding – suspension during pendency of disciplinary proceeding – inherent power of court.

D. Confidentiality – RULE 222 – The case becomes public record after the Review Committee finding of probable cause – confidentiality applies to all persons connected with the disciplinary process except the complainant and the respondent who are never covered by the rule of confidentiality.

E. Informal Admonition – RULE 203(a)(4) and (5) – done by Disciplinary Administrator in person – informal admonition is public discipline. There is no private disciplinary sanction - RULE 210(c). The majority of sanctions are informal admonitions.

1. Given on order of Review Committee after probable cause is found – appealable by the respondent to a formal hearing –

RULE 210(c) and (d)

2. Given on report of hearing panel after hearing – RULE 211(f) – no appeal

3. Given on order of Supreme Court after hearing arguments –
RULE 203(a)(5)

F. Disbarment by Consent – RULE 217 (voluntary surrender of license) – any attorney surrendering license during disciplinary proceeding shall be disbarred. Surrender stops pending disciplinary proceeding. Most disbarments occur this way.

G. Kansas Board for Discipline of Attorneys – RULE 204 – 20 lawyers appointed by the Supreme Court – decision makers within the disciplinary system - sit on Review Committee and Hearing Panels.

H. Immunity – disciplinary proceedings are deemed a judicial proceeding – all participants in disciplinary proceedings are granted judicial immunity and public-official immunity – RULE 223.

I. Lawyers Assistance Program (KALAP—Kansas Lawyers Assistance Program). Purpose: To provide immediate and continuing assistance to any lawyer needing help with issues, including physical or mental disabilities that result from disease, addiction, disorder, trauma or age and who may be experiencing difficulties performing the lawyer's professional duties. KALAP has the following duties pursuant to Rule 206: 1) to protect citizens from potential harm that may be caused by lawyers in need of assistance; 2) to provide assistance to lawyers in need; and 3) to educate the bench and bar about the causes of and services for lawyers needing assistance. KALAP records are confidential.

VIII. REVIEW COMMITTEE
RULES 204, 205 and 210

A. Review Committee – consists of three members – two of whom must be members of Kansas Board for Discipline of Attorneys – RULE 204(e) and 210(c) – major function is to determine probable cause as to each docketed complaint – RULE 210(c).

B. After investigation, Disciplinary Administrator makes recommendation to the Review Committee. RULE 210(c).

Recommendations may be:

1. Dismissal
2. Diversion
3. Informal Admonition

4. Institution of formal charges before a hearing panel

C. The Review Committee has the following powers:

1. Before a probable cause finding:

(a) Direct further investigation – RULE 210(c)

(b) Place case on hold pending outcome of related civil or criminal cases – RULE 214

2. After a probable cause finding – RULE 210(c), (d)

(a) Dismiss – over 75%

(b) Offer diversion

(c) Direct imposition of informal admonition

(d) Direct the institution of panel hearing procedures against the lawyer

IX. FORMAL HEARINGS

RULES 211, 215, 216, 223 and 224

A. Heard by a panel of three attorneys - two are members of the Kansas Board for Discipline of Attorneys and the third member is an “at-large” attorney. Chair of Board of Discipline chooses hearing panel members – RULE 211(a).

B. Hearings held in Topeka in the hearing room at the office of the Disciplinary Administrator – but may be conducted any place in the state – RULE 211(a).

C. Disciplinary Administrator drafts the Formal Complaint and serves it on the Respondent at his or her last registered address – RULE 215 and 208.

D. Respondent's answer due within 20 days after service – RULE 211(b).

E. Hearing date set by presiding officer of hearing panel – notice of hearing is served on respondent by Disciplinary Administrator – RULE 211(d) – hearing is usually scheduled to be held at least 60 days after date of Formal Complaint.

E. Formal evidentiary hearing – RULE 211

1. Rules of evidence and the rules of civil procedure apply, except where the Rules provide otherwise – RULE 211(d) and (e) and 224

2. Disciplinary Administrator prosecutes case – RULE 205(c)(6)

3. Disciplinary Administrator has burden of proof by clear and convincing evidence – RULE 211(f)
4. Criminal convictions and civil judgments based on clear and convincing evidence shall be conclusive evidence of the commission of that crime or wrong – a diversion agreement is deemed a conviction. All other civil judgments are prima facie evidence requiring respondent to disprove the findings – RULE 202
5. Adjudication of attorney misconduct in another jurisdiction is binding in Kansas – only issue is discipline – RULE 202
6. Deviation from rules or procedures are not a defense or grounds for dismissal absent actual prejudice – RULE 224(d)
7. If attorney intends to request probation, the attorney must file with the panel a written plan of probation at least 14 days before the hearing – RULE 211(g)

F. Final Hearing Report – Rule 211(f).

1. Panel must prepare a report setting out findings of fact and recommendations of discipline
2. Hearing Panel may consider prior record of respondent and any other mitigating or aggravating circumstances – which must be set forth in the Final Hearing Report –

RULE 211(f)

3. American Bar Association Center for Professional Responsibility publishes the Standards for Lawyer Sanctions, which the hearing panel and the Supreme Court use in considering sanction -

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/corrected_standards_sanctions_may2012_wfootnotes.authcheckdam.pdf

4. Possible actions by Hearing Panel:
 - a. Dismissal
 - b. Imposition of informal admonition by panel through Disciplinary Administrator
 - c. Recommendation of public censure, suspension, disbarment or any other methods of disposition with or without conditions – any of which require the case to be sent to the Supreme Court – RULE 203(a)(1)(2)(3) and (5) and RULE 211(f)
5. Appeal by Disciplinary Administrator – RULE 211(f)
6. Hearing Panel may assess costs of the proceeding to the respondent – RULE 224(c)

**X. SUPREME COURT HEARING
RULES 212, 224 AND 203**

A. Docketing with the Court – RULE 211(f) and RULE 212.
Case is captioned: *In the Matter of [Respondent's Name]*.

B. The record of the case consists of formal complaint, answer, panel report, transcript of hearing, if any, and all evidence admitted by the panel – RULE 212(b).

C. Respondent must, within 20 days, waive exceptions or file exceptions to the panel report. Any part of the hearing report not specifically excepted to shall be deemed admitted – RULE 212(c).

D. If exceptions are waived or not filed, the case will be set for hearing before the Supreme Court at which time respondent may make arguments with respect to the discipline to be imposed – RULE 212(d).

E. If respondent files timely exceptions:

1. Respondent's brief due 30 days after service of transcript – RULE 212 (e)(2)
2. Disciplinary Administrator's brief due 30 days after respondent's brief – RULE 212(e)(3)
3. Respondent has 10 days to file a reply brief
4. If respondent fails to file brief within 30 days after service of transcript the facts of the panel report are deemed to be supported by the evidence – RULE 212(e)(4)

5. The matter is then set for oral argument – RULE 212(e)(5)

F. Disposition – recommended sanction of hearing panel or Disciplinary Administrator is only a recommendation – Supreme Court can do any of the following – RULE 212 and 203:

1. Dismiss
2. Disbar
3. Suspend license – indefinite or definite

- a. With or without probation
- 4. Impose public censure – published or unpublished
- 5. Impose informal admonition.
- 6. Impose any other sanction, discipline or condition deemed appropriate by the Supreme court
- G. Sanction of disbarment or suspension is effective immediately upon the filing of the opinion – opinions are filed on Friday of court week following arguments – a known date.
- H. Imposition of costs by Supreme Court if discipline is imposed – RULE 224(c).
- I. Direct appeal by way of certiorari to U.S. Supreme Court – only remedy.

**XI. ACTION AFTER DISCIPLINE OF SUSPENSION OR
DISBARMENT
RULE 218**

- A. Respondent must notify all clients in writing of suspension or disbarment and respondent must notify courts and opposing counsel in writing and withdraw as counsel of record – violation of any suspension order is the unauthorized practice of law and a violation of KRPC 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law)- RULE 218.
- B. Respondent must pay costs assessed – RULE 224 and 218.
- C. Proof of compliance with RULE 218 is condition precedent to filing Petition of Reinstatement – RULE 218(b).

**XII. REINSTATEMENT OF SUSPENDED OR
DISBARRED ATTORNEYS
RULE 219**

- A. Disbarred attorney not eligible to apply for reinstatement for 5 years; suspended attorney not eligible for 3 years – RULE 219(a).
- B. Petition for Reinstatement to Supreme Court – RULE 219(b).
- C. Payment of \$1,250 and any outstanding costs before any action by court – RULE 219(b)(2).
- D. Determination by Supreme Court of whether sufficient time has elapsed considering the gravity of the acts leading to suspension or disbarment to justify reconsideration of prior order – RULE 219(d).

- E. If petition for reinstatement is not dismissed it is then referred to Disciplinary Administrator for investigation and then to the Board of Discipline for hearing – RULE 219(d).
- F. Full evidentiary hearing before hearing panel – respondent must prove a list of factors set out in the Rule by clear and convincing evidence – RULE 219(d)(4).
- G. If hearing panel report recommends reinstatement the matter is then submitted to the Supreme Court – if hearing panel report recommends denial of reinstatement petitioner has 15 days to file written exceptions with the court – RULE 219(e).
- H. Supreme Court may deny the petition or grant the petition with or without conditions or limitations - RULE 219(f) – Decision is made without briefs or oral argument unless requested by the Court – RULE 219(e).

**XIII. PROCEEDINGS WHERE ATTORNEY IS
INCAPACITATED – RULE 220; APPOINTMENT OF
COUNSEL TO PROTECT CLIENTS' INTEREST – RULE
221; AND IMPAIRED LAWYERS ASSISTANCE
PROGRAM – RULE 206**

These three rules constitute the court's directions in assisting attorneys who have, because of mental, physical or other impairment, become incapacitated – allows district court to appoint attorney to protect the interests of clients of neglectful or incapacitated attorney – allows state and local bar association to establish and fund impaired lawyers assistance committees.

XIV. ANNUAL REGISTRATION – RULE 208

Establishes system for annual attorney registration – establishes 4 groups of attorneys – active, inactive, retired, or inactive due to physical or mental disability – only active attorneys may practice law – attorneys who are retired or inactive and not engaged in the practice of law for any reason cannot reenter the practice of law without obtaining an order of the court – no registration or practice without payment of CLE fee and compliance with CLE requirements.